



TC03455

Appeal number: TC/2012/09354

VALUE ADDED TAX – appeal against decision compulsorily to register appellant pursuant to paragraph 5 Schedule 1 to Value Added Tax Act 1994 – appeal against late notification penalty – whether appellant liable to compulsory registration – yes – whether liable to a penalty for late notification of requirement to register under section 67 Value Added Tax Act 1994- yes- appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

TURGAT KARANDAL

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE & CUSTOMS**

Respondents

**TRIBUNAL: JUDGE GUY BRANNAN
MR TOBY SIMON**

Sitting in public at Bedford Square, London on 21 March 2014

Rakesh Rathod, Alton & Co Accountants, for the Appellant

Philip Rowe, Presenting Officer, for the Respondents

DECISION

Introduction

- 5 1. This is an appeal against the decision of the Respondents ("HMRC") that the appellant, Mr Karadal, was liable to be registered for VAT with an effective date of 1 January 2008. In addition, HMRC have imposed a penalty for late notification of the liability to register for VAT against which the appellant also appeals.

The facts

- 10 2. The evidence before us comprised two files of documents, a witness statement and oral evidence from Mrs Susan Hughes, an officer of HMRC, and a witness statement from the appellant. The appellant did not give oral evidence and was not cross-examined.
3. We find the following facts.
- 15 4. The appellant runs a takeaway food business in Colwyn Bay. It is a small shop measuring approximately 4 x 7 meters. There is no sitting area except for a small waiting area for customers waiting to collect their orders. The shop is open on Sunday to Thursday from 2.00pm to 1.00am and on Friday and Saturday from 2.00pm to 2.00am. The shop tended to be busy from 6.30 – 8.00pm and then again once the local
20 pubs and clubs closed. The shop was staffed by the appellant and by two part-time workers (one of whom, his wife, worked 16 hours per week and the other 18 hours per week).
5. The shop was in a residential area on a one-way street, one road behind the main High Street. There were few passing shoppers.
- 25 6. The appellant had previously been registered for VAT. However, he cancelled his registration for VAT in October 2007 when he was planning to sell his business. The sale fell through but he did not re-register his business for VAT because his accountants advised him, on the basis of the turnover figures which he supplied to them, that his business was below the registration threshold.
- 30 7. In May 2010 HMRC wrote to the appellant querying the de-registration because it appeared to them, from the appellant's self-assessment income tax returns, that the sale of the business had not taken place. The upshot of this correspondence was that the appellant, through his accountants Alton & Co, supplied turnover figures based on the appellant's manual records of daily takings which indicated that the appellant's
35 business was below the VAT registration threshold.
8. Mrs Hughes became involved in 2011 when she was asked to investigate whether the appellant should have been registered for VAT. In June 2011 she wrote to the appellant and Alton & Co requesting various documents, records and information.

This was the beginning of a lengthy correspondence between Mrs Hughes and Alton & Co.

9. In the course of her enquiry Mrs Hughes formed the opinion that the appellant's business records were not reliable. She had reviewed the business records supplied to her by the appellant and considered that in a number of respects they were unsatisfactory.

10. First, the appellant recorded his daily takings in manuscript and supplied these figures every quarter to Alton & Co who then used them to calculate whether the appellant was liable to be registered for VAT. However, these manuscript records were in many cases different from the daily takings recorded by the so-called "Z readings" on the appellant's cash register. Mrs Hughes' evidence was that there was not one month in which the Z readings agreed with the appellant's handwritten record takings. Usually, the difference was in the appellant's favour although there were some occasions on which, according to the Z readings, the manuscript records overstated the appellant's takings.

11. Secondly, Mrs Hughes noted that several months of Z readings were missing from the cash register records and, thirdly, that the cumulative totals recorded by the cash register had been re-set on three separate occasions in one year.

12. Finally, Mrs Hughes noted that there were a number of missing purchase invoices.

13. Having concluded that the appellant's business records were unreliable, Mrs Hughes undertook what she described as a credibility check. This recalculation of the appellant's turnover suggested to Mrs Hughes that the appellant's turnover was not below the registration threshold. Accordingly, in a letter to Alton & Co dated 9 August 2011, Mrs Hughes indicated her intention compulsorily to register the appellant.

14. Alton & Co replied on 19 August 2011 stating that the appellant had forgotten to store the Z readings after recording them in his takings book, that the discrepancy between the Z readings and the takings book was because the appellant and his staff were unable to use the cash register properly and occasionally punched in the figures incorrectly. The missing Z readings and the resetting of the cumulative total takings was explained by the fact that the cash register was stolen during the month of November 2010 and had to be replaced.

15. As regards the missing cash register, Mrs Hughes asked for a police crime number and purchase invoice for the replacement cash register. Alton & Co advised Mrs Hughes that the theft of the Cash register had not been reported to the police and the invoice, the appellant believed, was part of the papers which had been furnished to Mrs Hughes. Mrs Hughes checked the papers that had been supplied and there was no invoice for a replacement cash register. Furthermore, Mrs Hughes noted that, both before and after the alleged theft, the till receipts indicated that the cash register being used was the same make and model of cash register.

16. On 23 September 2011, HMRC notified the appellant by letter that he had been registered for VAT with effect from 1 November 2007. The letter also informed the appellant that a penalty was being charged under section 67 VATA at the rate of 15% of his net tax liability for the period from 1 November 2007 to 31 July 2011.

5 17. In the autumn of 2011 Mrs Hughes and Alton & Co exchanged correspondence in respect of different methods of calculating the appellant's turnover. On 28 October
10 2011 Mrs Hughes wrote to Alton & Co noting that Alton & Co had complained that her credibility checks had not taken into account changes in menu prices between 2008 and 2011, wastage, portion size, promotions and own consumption of raw
15 materials. Apart from a figure of £2,084 for "own consumption", Mrs Hughes noted that no other figures had been provided. Mrs Hughes had therefore conducted a further credibility check but this time on a different basis. She based her revised credibility check on the number of boxes for pizzas, burgers and lunches bought by the appellant's business and the average price for their contents as per the appellant's menu.

18. In the course of the subsequent correspondence, Mrs Hughes amended her "box-based" calculations by removing all soft drinks, from the calculation. She did this on the basis that some soft drinks may have been given away as goodwill gestures or promotions. She recognised that some drinks may have been sold, but even with the
20 figures for drinks removed, the appellant was still in excess of the registration threshold according to her calculations.

19. Mrs Hughes noted in her evidence that the appellant ordered pizza, burger and lunch boxes regularly either on a monthly or bi-monthly basis.

20. The revised calculations were based purely on the number of boxes purchased
25 by the appellant and the average cost of the contents of each box. This was based on the appellant's menu which showed prices for 20 different pizzas for 10 inch, 12 inch and 14 inch bases, and also the cheapest burger on sale at £2.00.

21. A 10% reduction was also given in respect of boxes which may have been given
30 away. For example, if two people were sharing a pizza the appellant might give them two boxes even though only one pizza had been bought. A 20% reduction was also given to reflect the fact that garlic bread was supplied in pizza boxes but at a lower price than pizzas. The figures excluded sales of soft drinks, chips and kebabs.

22. According to Mrs Hughes' calculations, the appellant's turnover for the year
35 ended 31/01/2008 was £113,454.50, for the year ended 31/01/2009 (an annualised estimated figure based on five months' receipts supplied by the appellant) the turnover was £120,487.80 and for the year ended 31/01/2010 (an annualised estimated figure based on seven months' receipt supplied by the appellant) the turnover was £67,026.93. In each case the estimated annual turnover figures exceeded the registration thresholds.

40 23. Calculating the running total on a monthly basis Mrs Hughes' calculations were as follows:

Month	Sales £	Running turnover £	Comments	Registration threshold £
February – 07	9454.50	9454.50		
March – 07	9454.50	18,909.00		
April – 07	9454.50	28,363.50		64,000
May – 07	9454.50	37,818.00		
June – 07	9454.50	47,272.50		
July – 07	9454.50	56,727.00		
August – 07	9454.50	66,181.50		
September – 07	9454.50	75,636.00		
October – 07	9454.50	85,090.50		
November – 07	9454.50	94,545.00	De-registered	
December – 07	9454.50	103,999.50		
January – 08	9454.50	113,454.00	EDR 01/01/08	
February – 08	10,040.58	114,040.08		
March – 08	10,040.58	114,626.16		
April – 08	10,040.58	115,212.24		67,000
May – 08	10,040.58	115,798.32		
June – 08	10,040.58	116,384.40		
July – 08	10,040.58	116,970.48		
August – 08	10,040.58	117,556.56		
September – 08	10,040.58	118,142.64		
October – 08	10,040.58	118,728.72		
November – 08	10,040.58	119,314.80		

December – 08	10,040.58	119,900.88		
January – 09	10,040.58	120,486.96		
February – 09	5,585.50	116,031.88		
March – 09	5,585.50	111,576.80		
April – 09	5,585.50	107,121.72		68,000
May – 09	5,585.50	102,666.64		
June – 09	5,585.50	98,211.56		
July – 09	5,585.50	93,756.48		
August – 09	5,585.50	89,301.40		
September – 09	5,585.50	84,846.32		
October – 09	5,585.50	80,391.24		
November – 09	5,585.50	75,936.16		
December – 09	5,585.50	71,481.08		
January – 10	5,585.50	67,026.00	DDR 31/01/10	

24. On these figures, Mrs Hughes calculated that the turnover between 01/01/2008 to 30/11/2008 was £109,860.30 resulting in output tax of £16,362.17, between 01/12/2008 to 31/12/2009 was £81,521.66 resulting in output tax of £10,633.26 and
5 between 01/01/2010 to 30/04/2010 was £5,585.50 resulting in output tax of £831.83 (although this last figure was later reduced when it was concluded that the appellant's liability to be registered ended on 31/01/2010).

25. It will therefore be seen that, according to Mrs Hughes's calculations, the appellant exceeded the registration threshold in every month in the period 01/01 2008 to 31/01 2010. The registration thresholds were: £64,000 in the period 01/04/2007 to 31/03/2008, £67,000 in the period 01/04/2008 to 30/04/2009 and £68,000 in the period 01/05/09 to 31/03/10 (paragraph 3 (3) Schedule 1 Value Added Tax Act 1994 ("VATA") as amended from time to time).
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26. In a statutory review in February 2012, HMRC decided to amend the decision compulsorily to register the appellant to "liable, no longer liable", in view of the appellant's turnover appearing to have fallen below the threshold after January 2010. The "liable no longer liable" designation is a discretionary procedure operated by HMRC in circumstances where an unregistered trader exceeds the threshold and then
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later falls below it. Strictly, when a trader is registered for VAT he is liable to account for VAT even if he falls below the threshold unless he applies for de-registration. "Liable no longer liable" is, effectively, an administrative process of registration and deregistration. The "liable no longer liable" policy was described by Judge Walters QC in *Michael Robert Haynes v Revenue & Customs* [2013] UKFTT 160 (TC) as:

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"a humane and sensible policy of seeking to recover from a person liable for VAT but who has not registered, only the amount of VAT due for the periods when he was liable for VAT. That is, HMRC do not in these circumstances seek to recover VAT due for periods when the person was not liable for VAT, although he ought to have been registered for VAT in such periods."

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27. In accordance with the "liable, no longer liable" procedure, HMRC treated the appellant as liable to be registered from 1 January 2008 (instead of from 1 November 2007) to 31 January 2010.

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28. Subject to the alteration of the date of registration, the review upheld Mrs Hughes' conclusions. In particular, the review confirmed Mrs Hughes' decision to reject the takings figures provided by the appellant and to use the "box-based" method described above. However, one consequence of the "liable, the longer liable" designation was that the imposition of the late notification penalty notified to the appellant on 23 September 2011 was cancelled.

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29. On 20 July 2012, HMRC notified the appellant of the date of registration from January 2008 and of assessments under section 73(1) VATA in the amount of £26,054.32 for the period 1 January 2008 to 31 January 2010. The notification also informed the appellant of a penalty in the amount of £2,931 (calculated as 15% of the assessed VAT) in respect of the appellant's liability to register for VAT pursuant to section 67(1) and (4) VATA.

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The statutory provisions and the appeal

30. The relevant part of the law is contained in the provisions of Schedule 1 VATA. The obligation to register is in paragraph 1(1) which provided a person is liable to register:

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“(1)(a) ... at the end of any month, if the value of his taxable supplies in the period of one year then ending has exceeded [a specified figure]”

31. As noted above the specified figure, usually referred to as the “registration threshold”, was £64,000 in the period 01/04/2007 to 31/03/2008, £67,000 in the period 01/04/2008 to 30/04/2009 and £68,000 in the period 01/05/09 to 31/03/10 (paragraph 3 (3) Schedule 1 VATA (as amended from time to time).

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32. Under paragraph 5(1) Schedule 1 VATA a person who becomes liable to register under paragraph 1(1)(a) shall notify the Commissioners within 30 days of the end of the relevant month. Having failed to notify the liability to register for VAT HMRC are required to register a trader by virtue of paragraph 5(2) Schedule 1 VATA.

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33. However, this obligation to register is overridden if paragraph 1(3) Schedule 1 VATA applies. This provided:

5 “A person does not become liable to be registered by virtue of sub-paragraph 1(a) ... above if the Commissioners are satisfied that the value of his taxable supplies in the period of one year beginning at the time at which, apart from this sub-paragraph, he would become liable to be registered will not exceed [a specified figure]”

34. This specified figure, usually referred to as the “de-registration threshold”, was £62,000 for the period 01/04/2007 to 31/03/2008, £65,000 for the period 01/04/2008
10 30/04/2009 and £66,000 for the period 01/05/2009 to 31/03/2010.

35. In other words, a person who would otherwise be liable to register under paragraph 1(1)(a), is not liable to register if HMRC are satisfied, looking ahead 12 months, that his turnover would not exceed the de-registration threshold.

36. Where the period of default was more than 18 months, the penalty rate of 15%
15 of the assessed tax fell to be applied under section 67(4)(c) VATA (because the period beginning on the date with effect from which the appellant was required to be registered and the date on which HMRC became aware of the liability to register exceeded 18 months). HMRC applied a 25% discount in mitigation reflecting the cooperation of the appellant.

20 37. Section 70(1), VATA provides that HMRC or, on appeal, a tribunal may reduce the penalty to such amount (including nil) as they think proper. Section 70(3) precludes the taking into account of the following items (listed in section 70(4)):

- 25 ‘(a) the insufficiency of the funds available to any person for paying any VAT due or for paying the amount of the penalty;
- (b) the fact that there has, in the case in question or in that case taken with any other cases, been no or no significant loss of VAT; and
- (c) the fact that the person liable to the penalty or a person acting on his behalf has acted in good faith.’

38. The appellant appealed against his liability to register for VAT and against the
30 section 67 VATA penalty on 18 September 2012. Although framed in terms of an appeal against the assessment to VAT of £26,054.32, HMRC accepted that the appeal was in effect against HMRC's decision to register the appellant from 1 January 2008 to 31 January 2010. Strictly, the assessment is not appealable by virtue of section 83
35 (1)(p)(i) VATA because no VAT return for the period has been submitted by the appellant. HMRC acknowledged, however, that if the decision to register the appellant for the period from 1 January 2008 is upheld, the assessments can be replaced with a VAT return for the period 1 January 2008 to 31 January 2010 and that return would replace the assessments issued under section 73 (1) VATA and any penalty would be re-calculated accordingly.

Discussion

39. Mr Rathod submitted that the figures on which Mrs Hughes had based her decision that the appellant was liable to be registered were unrealistic. He calculated, roughly, that on the amount of pizzas which Mrs Hughes had calculated will be served, allowing 15 minutes for each pizza, the oven would have to run for 5 1/2 hours per day continuously. The force of this submission was diminished, however, when Mr Rathod accepted that the appellant's pizza oven could cook two pizzas simultaneously and that this was likely to occur in busy periods.

40. Mr Rathod also argued that Mrs Hughes' figures were not reliable because Mrs Hughes' figures indicated that the monthly turnover for the period February 2009 to January 2010 was £5,585.50 but that in the following 12 months turnover fell to £3449.58. Mr Rathod argued that such a significant reduction indicated that the higher figure of £5,585.50 was incorrect.

41. Furthermore, the size of the shop, its opening hours, the limited number of people working in the shop and its location meant that the turnover figures produced by Mrs Hughes were unrealistically high. In addition, there were a number of boxes that were given away as part of "buy one get one free" offers. Thus, the number of boxes ordered was not the same as the number of boxes sold.

42. In addition, Mr Rathod drew attention to a charge of £2,719 in the accounts of the appellant's business in respect of electricity and gas. He suggested that if the sales had been as high as Mrs Hughes had estimated these figures would have been higher. Again, the force of this submission was diminished by the fact that Mr Rathod accepted that the premises would have been lit and heated and that the pizza oven would have been heated on a continuous basis regardless of the quantity of food produced.

43. In our view, HMRC were correct to require the appellant to be registered for VAT from 1 January 2008 until 31 January 2010.

44. We accept the evidence of Mrs Hughes that the appellant's business records were unreliable. We were not persuaded that the appellant's cash register had been stolen, as claimed, in the light of the appellant's failure to produce a police report or an invoice for a new cash register.

45. Moreover, we accept Mrs Hughes' evidence that the Z readings did not tally with the appellant's handwritten record of daily takings upon which he is VAT returns were based. We only had before us legible Z readings and the takings records for 48 of the days over the period 4 August to 14 November 2010, which did not cover the period under appeal. Nonetheless, we compared these and noticed a significant number of discrepancies, as set out in the table below. The appellant's handwritten records were almost 10% lower than the Z readings, and there was one occasion when takings were under-reported by £1000. This was consistent with Mrs Hughes' evidence.

Date	Per Cash Register	Per Paper Record	Difference
07/08/2010	£ 335.58	£ 133.94	£ 201.64
08/08/2010	£ 133.94	£ 100.80	£ 33.14
15/08/2010	£ 296.87	£ 296.20	£ 0.67
26/09/2010	£ 363.45	£ 263.45	£ 100.00
27/10/2010	£ 146.32	£ 142.30	£ 4.02
31/10/2010	£ 335.91	£ 235.00	£ 100.91
04/11/2010	£ 1,103.61	£ 103.61	£ 1,000.00
09/11/2010	£ 453.72	£ 130.20	£ 323.52
13/11/2010	£ 237.63	£ 137.63	£ 100.00
Totals for dates compared during period			
	£ 9,071.67	£ 7,207.78	£ 1,863.89
Understatement			20.5%
Excluding 4 November			
	£ 9,071.67	£ 8,207.78	£ 863.89
Understatement			9.5%

46. In addition, we accept Mrs Hughes' evidence that several months of Z readings were missing, the cash register totals had been reset three times and (which was not challenged) a number of purchase invoices were missing.

5 47. On this basis, we considered that Mrs Hughes correctly reached the conclusion that the appellant's business records were unreliable.

48. We further consider that the method by which Mrs Hughes calculated the appellant's turnover for the period in dispute was reasonable. Basing her figures on the number of pizza and burger boxes purchased by the appellant, but making allowances for sales of lower-priced garlic bread and for customers sharing a pizza seemed to us reasonable. In addition, Mrs Hughes based her calculations in respect of burger sales on the lowest price burger at £2.00. Moreover, her figures excluded the sale of soft drinks, chips and kebabs – an approach which seemed, if anything, to err on the side of generosity.

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15 49. We accept that, as Mr Rathod argued, there was a significant reduction in turnover as mentioned in paragraph 40 above. We did not, however, consider that this meant that Mrs Hughes' calculations were unreliable. Her analysis was an estimate and therefore a rough-and-ready element in the calculation was inevitable.

50. Accordingly, we consider that HMRC was correct to decide that the appellant was liable to be registered for VAT from 1 January 2008 until 31 January 2010. For completeness, we saw no reason why HMRC should consider the exclusion from compulsory registration contained in paragraph 1(3) Schedule 1 VATA would apply.

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51. Furthermore, on the basis of the amount assessed under section 73 (1), we consider a penalty was due under section 67(1) at the rate of 15%. We saw no reason

to disturb HMRC's decision to mitigate the penalty by 25%. Because the appellant did not attempt to argue that there was any reasonable excuse for the failure to register in time, we considered that the penalty should be upheld. The amount of the penalty may, however, be altered if the appellant files a VAT for the period in dispute.

5 52. For these reasons we dismiss this appeal.

53. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later
10 than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

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**GUY BRANNAN
TRIBUNAL JUDGE**

RELEASE DATE: 2 April 2014

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